WORKMEN'S COMPENSATION AND THE FEDERAL CONGRESS

The Congress of the United States holds jurisdiction over two groups of employees for two diverse reasons—those engaged in interstate commerce, by reason of that provision of the Constitution which gives it the power to regulate commerce between the states; and those employed by the government, by reason of its legislative authority to determine the conditions of employment of public servants.

FEDERAL EMPLOYEES

While employers generally have been subject to suits for damages resulting from their negligence, the state has enjoyed the immunity of the king who "can do no wrong," and it is only as a matter of grace that employees injured in its service have been able to secure redress. When the floors of the Ford Theater building, occupied as an office by the War Department, collapsed in 1893 while repairs were being made, and caused severe bodily injury and loss of life to a number of the clerks employed therein, an appropriation was necessary before relief was available for the injured men and their families; and frequently cases before the Court of Claims or special bills before Congress attempt to secure relief such as under another employer would be had through employers' liability or workmen's compensation laws.

A degree of recognition of the need of some more general remedy than that by claims or special bills has appeared in connection with federal employees, beginning with an act of May 4, 1882, amended in 1898, making provision in case of the injury or death of certain persons in the Life-saving Service. For the clerks in the Railway Mail Service appropriations have been made since 1900 for the benefit of those injured while on duty, since 1903 including also the families of those whose injuries were fatal. Clerks in the Sea-Post Service were included in 1912; and city and rural letter carriers, post-office clerks, and special-delivery messengers, in 1914.

In the Life-saving Service, the benefits consist of two years' pay if disability continues so long, and the same amount to dependents if the injury causes death. Protected employees in the postal service may receive full pay for one year, and half-pay for a second year, for injury; for death, a lump sum of $2,000 is allowed.

The next step toward federal compensation legislation seems to have been a bill in 1904, applicable to employees in the navy yards and naval stations of the United States. Two bills of wider scope were introduced in the next (Fifty-ninth) Congress, and a dozen or more at the first session of the succeeding Congress. One of these became a law, and is known as the act of May 30, 1908. Its purpose, as declared by its proponent, is to afford protection to "government employees engaged in hazardous occupations." It included within its scope artisans and laborers in manufacturing establishments of the United States, in arsenals, navy yards, the construction of river and harbor and fortification work, in hazardous employment on construction work in the reclamation of arid lands or the management and control of the same, or in hazardous employment under the Isthmian Canal Commission. Numerous amendments have been proposed, with the net result that at present employment on the Isthmus is excluded from its provisions and employees in hazardous employment in the Bureau of Mines, the Forestry Service, and the Light-House Service are included.

The law provides in brief for the payment of full wages during disability or as a death benefit to certain dependents of workmen dying from injury, the term of payment being limited to one year. It is administered in the Department of Labor.

The act is a pioneer in the United States, being antedated in this field only by a very restricted and imperfect co-operative insurance scheme for certain classes of workmen, enacted by the legislature of Maryland in 1902, and declared unconstitutional after a brief experience. However, the fact of its being a pioneer in this country cannot condone the numerous shortcomings of the act of 1908, since the experience of European countries was available to its draftsman but was very evidently not at all taken into consideration.

Its defects relate both to substantive provisions and to administrative method. First may be noted its incompleteness in scope,

embracing as it did at its most inclusive period, prior to the elimination of the Isthmian Canal employees, approximately 95,000 persons. If to these be added those covered by the provisions made for the Life-saving and Postal services, it is yet the fact that not one-half of the civilian employees of the United States have a measure of protection in case of injury in course of employment. This leaves above one-half without redress at law in case of fatal or disabling injury; and in many cases these persons are exposed to identical hazards with those protected by the act, but because the establishment is not one of those enumerated they are excluded.

But besides the exclusions based on enumeration, in some of the establishments or undertakings named in the act only those employees are cared for who are engaged in "hazardous employment." It is poor consolation to an injured person, or his dependents in case of death, to be told that the employment in which he was injured was non-hazardous, accidents in it being very unusual. Moreover the question is one of opinion in large degree, statistics of accident rates not being available in all cases. In any view the matter resolves itself into this, that a given occupation is hazardous, so that those engaged in it may properly expect provision to be made in their behalf; or the risk is comparatively slight, so that the cost of providing for the occasional injuries arising in it is not burdensome on the employer, while at the same time the needs of the injured individual are no less urgent than if he were one of a larger group.

Another defect is in the inadequacy of relief in the case of serious or permanent disability or of death; while for minor injuries of sixteen or more days with complete recovery, the payment of full wages not only makes the amount of relief disproportionately large, but is also contrary to all compensation practice. Reasons of administration as well as equity argue against the payment of the same amount to an unemployed person as if he were employed, even though the employment is due to injury, unless in very exceptional circumstances. A case is on record where, under this act, a workman earning more than $2,000 a year remained out of work for fifty-one weeks and drew $2,008 as compensation. It is not impossible that a man should recover after fifty-one weeks of

disability, but circumstances known to the administrators of the law, upon which they were however powerless to act, indicated that if he had been drawing compensation on the customary one-half or two-thirds basis he would have returned to work at least five months before he did, while during the period of his actual disability he would have received benefits on a compensation basis proper, and not on the basis of his exceptional earning capacity. But as no serious proposition for new legislation offers the 100 per cent basis for compensation, nothing further need be added on this point. Where disability is permanent or death ensues, the amount of one year's wages is in most cases a mere pittance, and not worthy the name of compensation.

In this connection may be noted a provision that a large majority of state laws contain, but which is not found in the federal statute, and that is one for medical and surgical aid at the expense of the employer. This is a well-certified economy, since prompt and thorough attention may easily shorten the term of disability, or save a member or even a life. The niggardliness of some of the state laws of the present year in this respect can hardly be excused, since the workman is all too prone to defer the securing of advice or to fail to continue to observe directions, in the hope of saving expense, the outcome being often the transformation of a slight into a serious injury, for which the employer or his insurer must ultimately pay.

The federal statute grants no relief unless the disability extends beyond fifteen days; but if it does, full wages are paid from the beginning. This offers a premium for the delay of recovery after a disability of from ten to fourteen days; and without intentional dishonesty, it is the easiest possible matter for one to be sure that he will be much better able to return to work after a few more days for recuperation, when also he will receive full pay for all time lost; while the earlier return will cut off all opportunity for compensation. To shorten the waiting time, making no payment for it at any time, and to give medical aid to facilitate recovery and relieve the workman of this expense, would accord with current judgment and tend to better administration, in many cases making the compensation more adequate, and in all cases equalizing awards, in

view of the contemplated extension of benefits where disability is prolonged.

There is no intention of suggesting a prevalent disposition to malinger, but it is the universal experience that a certain percentage of persons are to be found in all classes of society that require a stimulus for the resumption of physical activity after a period of unemployment from disability, the unwillingness sufficiently to exercise an arm recovering from fracture, for instance, being a fully recognized difficulty in the way of rapid and complete recovery. This leads to the consideration of an administrative provision that has appeared in a few state laws of recent enactment, and that has been urged by the present writer for a number of years; and that is as to the requirement that a claimant of social benefits, as one becomes in a distinct degree when receiving compensation payments, should to a reasonable extent surrender the right of private judgment and accede to the opinion and advice of competent persons in matters pertaining to hygiene and surgery. Under the act of 1908, insanitary practices may be persisted in and surgical operations, however slight and however beneficial in prospect, may be refused, and compensation still be demanded as of right. A provision suspending payments during the continuance of such conduct is found in some state laws, and its propriety is indicated in a number of cases arising under both the state and the federal statutes. It is obvious that no fixed rule is possible; and where the question has been raised there has been an apparent conservatism, which accords with the liberal-construction theory applicable to remedial legislation in the recognition of individual rights, while holding also to the necessity for a broader view on occasion.

The method of providing funds for the compensation payments contemplated by the act is for each establishment to pay from its appropriation for work the sums falling due on account of injuries accruing during the performance of that work. In some instances in which specific appropriations have been made, as for the repair of a launch, or other designated object, the result has been that an injury occurring early in the undertaking has absorbed such a large portion of the sum appropriated as to interfere seriously with the completion of the work. Shortly after the act came into effect

a conference of officials representing the departments interested developed the importance of putting the matter of funds on a basis of its own, so as to make the compensation payments independent of the wage fund.

Another question of large importance relates to administration. The law of 1908 is exceedingly scanty in its provisions in this respect, and correspondingly inadequate, with unsatisfactory results in relation to the various departments and establishments affected and the office charged with the duty of administration.

Other details might be pointed out and specific instances given showing the effect of the conditions indicated, but certainly enough has been said to show the need of new legislation by Congress, at the earliest opportunity, on this subject of such general interest and of special importance to the employees of the United States. The need of argument would seem to be negligible from one aspect, as nearly three years have elapsed since Congress empowered the President to provide a method of determining and adjusting claims arising out of personal injuries to employees on the Panama Canal and the Panama Railroad and prescribe a schedule of compensation therefor. As a consequence there is now in force for the workmen designated, not the crude and inadequate law to which artisans and laborers in federal employment in the states must look as their only redress, but a comprehensive order providing benefits practically on a basis of 50 per cent of the wages during a term of eight years for permanent disability or death, and including also benefits for partial disability, medical services, a reduced waiting time, and other features of a type corresponding to the form of legislation current in the United States.

As matters now stand, therefore, there are four forms of compensation laws of federal enactment or authorization, yet leaving practically three-fourths of the civilian employees of the government without either right of award of compensation or power to sue for damages in case of injury in employment. A new group of workmen exposed to pronounced hazard will also be brought together in the railroad construction work in Alaska, to be undertaken under provision of the act of Congress of March 12, 1914, for the commencement of which Congress at its last session appro-

priated without making provision for the injuries that are bound to occur to the workmen.

Let us compare briefly existing methods, noting how they vary in method and result. Certain Postal-Service employees receive one year's full pay for disability, with half-pay for a second year, while in the Life-saving Service full pay may continue for two years. Death benefits in the first case are a fixed sum of $2,000, paid in a lump; while for the latter the amount is two years' pay in quarterly instalments. One year's pay for death or disability is the maximum under the law of 1908, paid as wages are paid; and in the Canal Zone, 50 per cent of the wages paid during eight years is the award. If any one of these methods is good and adequate, the others are bad and unjust to one or both parties. It is hardly too much to say that all but the presidential order applying to the Canal Zone violate every principle of approved compensation legislation, while the rate in that is lower than the more advanced laws provide; so that it would seem to be pre-eminently a duty of Congress to determine as soon as may be what is a fair and equitable treatment for the employees of the United States in this regard, and to grant that treatment to all alike. If it be argued that diversity of circumstances warrants diversity of awards, the reply is that to take the wages or salary as a basis, within the customary minimum and maximum limits, secures a diversity that will correspond to existing economic conditions. All are demonstrably entitled to protection in some degree, and no better measure has yet been devised than that of the developed earning capacity of the workman for whose disability compensation is to be made.

Space is not available, nor is it desirable in this place, to go into the details of the provisions of a suitable law. Bills representing experience of administration and a wide and careful study of the many questions involved have been introduced in Congress, but have failed of enactment, rather from inertia and from press of other matters than on account of any apparent opposition, many if not all the departments interested having given their approval to the idea of a more inclusive and better-balanced law. One additional point is worthy of mention, however, and that is as to costs. Under existing systems, prior to the order covering the Canal Zone,

approximately $500,000 was being paid out, according to reports of the Bureau of Labor Statistics; and as these systems all provided for the payment of full wages in cases of disability, it is evident that payment on a percentage basis would reduce the amounts, while the fixing of maximum limits would effect a further reduction in cases of temporary disability, which are by far the greater number of all cases. Thus a bill proposing to pay two-thirds of the wages as compensation also fixed one hundred dollars as the maximum monthly earnings that should be considered. Under these provisions the largest sum payable an individual in one year would be $800, and while this is a fairly liberal compensation award, under the act of 1908, of the 2,818 cases in which compensation for injury was paid in 1910–11, there were 810 in which the annual earnings ranged from $900 to $2,500. It has been estimated that at least until the cumulative effects of continuing payments developed, the cost of a comprehensive, uniform law such as is here advocated would fall within the present expenditures of this nature. But the question of justice and equity is the controlling one, rather than that of cost. In the present situation it seems to be more largely a matter of fair and scientific adjustment than of amounts.

A desirable law would merit and require a thorough and responsible administration; and experience bespeaks in this connection the same conclusion that theory would suggest, and that is an independent commission to give thorough attention, not only to relief, but to prevention as well, and to administer uniformly for all groups and classes a law that should foster good relations between employers and employed, securing for both the fullest protection possible against any tendency to overlook proper precautions as to health and safety, together with the earliest and most complete restoration attainable to a capacity for resumption of employment under conditions safeguarding the interests of both parties.

INTERSTATE COMMERCE

So far as results are concerned, the history of congressional legislation for the regulation of the redress of injuries to railroad employees is brief. Prior to the enactment of the liability act of 1906, no federal provision had been made for determining the rights

of such redress, the subject being left to decision under the principles of common law or to control by the statutes of the state within which the injury might accrue. The idea was even maintained by some of the courts that the states alone were authorized to legislate in this field, the relations between employer and employee not being within the purview of congressional action, not being commerce in the sense of the provision of the Constitution under which action might be taken. The Supreme Court denied this contention, however,[1] but held the act of 1906 unconstitutional because embracing intrastate matters, with which Congress had no power to deal. This decision was shortly followed by the act of 1908, drawn with a particular view to overcoming the objections found by the Supreme Court to the act of 1906. The later act, with an amendment of 1910, establishes the liability of interstate railway employers for their negligence resulting in injury to their employees, abolishing the defense of fellow-service, and modifying the defenses of contributory negligence and assumption of risks, and stands as the sum of present achievement in its territory. The result is a decided advance over the previous situation, furnishing a uniform standard for all jurisdictions (though subject to considerable differences of interpretation, due to local variations in views and practice), and mitigating to a considerable degree the severity of the common law. In fact, its enactment at a time when the idea of compensation was just coming into prominence operated to check to some extent the growth of that idea, or at least its fruition as far as Congress was concerned. It was during the effort to secure this statute that a representative of one of the great organizations of railroad employees said to the writer: "Our people don't know about this compensation idea, and are afraid of it. What we want is a good stiff liability law." But this man on further information became a strong supporter of the new plan, though there are, or at least were a year or two ago, some who still object to any wide departure in legislation, saying that they had secured this law after many years of effort and did not wish to see it set aside, at least until it had had a fair trial.

[1] *Howard* v. *Ill. C. R. Co.* (First Employers' Liability Cases), 207 U.S. 463, 28 Sup. Ct. 141.

The first bill looking toward the enactment of a compensation law for railroad employees was introduced by Hon. A. J. Sabath, of Illinois, in February, 1908, other bills being introduced by him in 1908, 1909, and 1910. Hearings were had in 1910, but no report or recommendation was made. However, provision was made by a House Joint Resolution of June 25, 1910, for the appointment of a commission on the subject, a report being made by it in March, 1912. Valuable work was done by this commission, and a bill drawn by it, known as the Sutherland bill (Senate, No. 5283), was, with considerable modifications, passed by the Senate of the Sixty-second Congress. Further amendments were made in the House, and strenuous opposition developed, following out criticisms that had been made in the Senate. It passed the House, however, and an effort was made in the Senate to secure concurrence in the House amendments, the proponent of the bill moving their acceptance without conference; but though it had passed the Senate by a vote of 64 to 15, and the House by 218 to 81, it could not be brought to a vote in the closing hours of Congress, and so died. The amendments in the House, so far as they were not merely formal, went to the liberalization of the bill in the interests of the employees, but even this was not able to satisfy its antagonists in the upper body.

An interesting history might be written of this series of events, embodying as it would an account of the briefs and statements of representatives of practically all the important railroad employees' associations, the American Federation of Labor, the National Civic Federation, the American Association for Labor Legislation, the National Conference of Commissioners on Uniform State Laws, railroad companies, railroad attorneys, officials of states having compensation laws, etc. So unanimous was the opinion in favor of a compensation law that its principal industrial opponent at the hearings said at the opening of his remarks that "the most impressive feature of the discussion has been the almost undivided support given the theory of workmen's compensation by those employers and employees that have appeared before legislative committee hearings." Opposition on the floor of Congress was in large measure localized geographically, and petitions from labor

unions of the territory represented were brought in with the declaration that the entire attitude of the interested workmen of one state was changed in two days. During the discussion in the Senate and House, the principle, "Fear the Greeks bearing gifts," was introduced and reiterated with emphasis, the argument being that if the railroads and their attorneys favored the act, it was doubtless inimical to the interests of the workmen. Yet at the hearings the actual opposition from the industrial side seems to have been mainly if not entirely based on an extremely narrow view of the interests of an organization representing but a fraction, even if an important fraction, of those affected. Continuing his remarks, the same speaker who was quoted above as admitting the practical unanimity of sentiment in favor of the bill, said:

> There seem to have been but few to question its advisability or to present reasons why the abandonment of American ideas and the adoption of European practice may be detrimental, at least to those American workmen who have expended years in building up magnificent systems of compensation for death and disability arising from any cause, and in creating by constant agitation a public sentiment, which during recent years has resulted in greatly improved employers' liability legislation, both State and National.
>
> The writer realizes that the great mass of working people in this country have not exhibited that degree of ability and determination necessary to protect themselves in proper manner, and that something should be done to help these helpless working people. What is said herein against the theory of workmen's compensation does not apply to the millions who have proven themselves helpless, and who apparently must depend upon a paternal government for compensation for injuries arising out of modern industries. The sole purpose is to present the question from the standpoint of a railway employee in train service, who has found means of helping himself in matters of compensation for injuries arising out of his employment.

The gist of the argument is therefore that we who have a well-filled treasury from which to care for our members in cases of accident where suits appear to be unpromising, wish to be left with the privilege of doing so, suing where there is evidence of negligence; and in order that this may be done, we oppose legislation that is clearly desirable for the great body of workmen who, for whatever reason, are not so favorably situated as ourselves. That this is the result appears from the fact that the matter of organization and resources could hardly be called in to determine the basis of a

classification that would stand the test of the courts; and even if such a law could be enacted, the unwisdom of allowing a variety of remedies for the different classes of railroad employees is too apparent to need discussion. If class distinctions and class solidarity are regrettable and un-American, there is at least no cause for regret on that score in an argument that can so easily turn aside the many needy for the supposed advantage of the few able.

The chief point made against the bill on the floor of Congress seems to be that it proposed the overthrow of a time-tried and familiar system by one that was new and unknown. The principles and facts so abundantly presented in the report of the commission, the extensive experience of European countries, and the personality of the supporters on behalf of labor, were alike held to be unconvincing, and opposition was waged in the name of labor, which must retain its right to sue for damages, in order that its attorneys might "make the railroad companies twist and squirm." The fact of the superior capacity of the companies to maintain a legal conflict was disregarded, as also the great waste of funds that, under a properly devised compensation system, would in part at least go to the relief of the injured workmen and their families without the engendering of strife that so uniformly accompanies litigation.

As little as one may approve the method and form of the opposition, it must be conceded that the bill was in several respects open to improvement. It was compulsory in form, so that its adoption would have excluded suits in any case, which is a sound principle, since to enact a good law (and no other should be enacted), and then leave it to the option of the persons for whom it was enacted to choose whether or not they will use its provisions or those of a system that is condemned by the very fact that the new law has been enacted, does not commend itself as a method of governmental procedure. Nevertheless, such legislation should present adequate as well as certain relief; and while the bill as drawn compared fairly with the state legislation of its time, and even with a number of existing laws, the progress of the compensation idea has led to the liberalizing of awards, both as to amounts and periods. Fifty per cent of a deceased workmen's wages for eight years, the monthly benefits not to exceed fifty dollars, children above the age

of sixteen years receiving nothing unless mentally or physically incapacitated for earning a livelihood, does not on the face of it compare favorably with judgments in damages in amounts ranging up to ten, twelve, or fifteen thousand dollars or even more. And it is easy to forget the relative infrequency of such verdicts, the large part that goes to the attorney as his contingent fee, and the long delay, so that much of what is won is spent in anticipation and at large discount. Moreover there is a majority of cases of injury (said by some authorities to be above 80 per cent) in which no recovery whatever is had under the doctrine of liability.

But the need of more generous allowances cannot be gainsaid. For permanent disability the payment was to be for life, but with the same limits as to basis and rates. Approximately two-thirds of the wages (65 or $66\frac{2}{3}$ per cent) are paid in five states, in one by amendment after an experience of two years on a 50 per cent basis. By paying this amount until the death or remarriage of a widow or dependent widower, to children until the age of eighteen, and during the full term of disability, the charge of inadequacy would seem to be fairly overcome, at the same time, according to experience, not overburdening the industry.

The Sutherland bill proposed its administration by adjusters to be appointed by the United States District Courts for each judicial district, with appeals to these courts, and process to be enforced by them. These provisions were sharply attacked as placing the whole subject in the hands of the federal courts and their agencies, to the exclusion of the state courts; and this too seems a natural and just objection. The removal of suits on grounds of diversity of citizenship has so long been a practice of railroad defendants that a general feeling of hostility to such procedure has grown up, and not without reason. The creation of a Federal Commission of Compensation and the appointment by it of local referees for suitably arranged districts, with the right of appeal either to the Commission or to the state or federal courts, appears to offer a solution for the difficulties found in this aspect of the defeated bill of the Sixty-second Congress.

The conditions prevailing throughout the Sixty-third Congress were not favorable to the consideration of a measure of this class,

though several bills were introduced. One of these was presented by Hon. Mr. Hamlin, of Missouri (H.R. 21,273), and embodies the points as to benefits and administration indicated above. It is elective in form, but is of such a nature as to encourage its acceptance, defenses being withdrawn in case of its non-acceptance by the employer, as is done in a large number of the states. However, it is submitted that, as already expressed, a law of this class should really be a law and not a suggestion for acceptance or rejection at will.

Such an act should also contain a provision permitting reasonably anticipated increases of earning capacity to be taken into consideration in fixing awards to young workmen which are to run for long periods. Another change that, in the writer's opinion, might properly be made is one that would limit benefits payable on account of the death of aged workmen to a period at least not extending beyond their life expectancy. This is suggested by striking cases developed under state laws, where it may be of more importance than under a law relating only to railroad employments; but to give benefits running for eight years on account of the death of a workman seventy-eight or eighty years old, for instance, is to put a premium on his death, according to the expectation of life at that age.

Possibly other details will come into view in the consideration of the bill, but its provisions apparently incorporate the largest number of desirable provisions of any yet submitted to congressional consideration.

An added word is due the functions of the administrative commission proposed by this bill, in view of its declared purpose to take over the work of the Interstate Commerce Commission in the matter of the reports of accidents on railroads. Since the Compensation Commission must receive these reports for the proper performance of its duties, and since the interest of the Interstate Commerce Commission in this subject is rather statistical than otherwise, this seems a proper and almost necessary provision, since a double system of reports would merely add to the burdens of the railroads without serving any good purpose. It would seem furthermore to be a logical step to transfer the enforcement of the

safety-appliance laws and the work of locomotive-boiler inspection to the new body, leaving the work of the Interstate Commerce Commission as it was originally planned, i.e., a supervision of financial matters and business operations rather than of equipment; while the compensation body, concerned with matters of safety and of accident prevention no less than with the proper compensation of accidents, would have a natural and strong interest in these subjects more or less alien to the real concerns of the Interstate body. Many of the state laws combine these functions in the manner here indicated.

Such features of the law might require more extensive consideration; but with thirty-one states now having compensation laws, eight of which, besides Alaska and Hawaii, adopted this principle in 1915, the time would seem to be ripe for a step in this direction which Congress alone can take; unless, indeed, it should follow one suggestion and repeal the existing liability act, leaving the subject again to the states. The vast amount of litigation under the liability act of 1908, and the extensive recognition of the defense of assumed risks, apparently unexpected by the earlier supporters of the act, together with the comparatively slow process of determining its scope and proper interpretation, all point to a probable readiness to part with this form of relief. That it should prove inadequate on test can cause no surprise, since this has been the case without exception with reference to liability laws in their application to modern industrial conditions; while no state or country has ever reverted to the liability system after having made trial of the principle of compensation.

Momentous, therefore, as may be the questions of international import that may confront the approaching Congress, it may well be hoped that it will find opportunity and inclination to take up this question affecting the welfare of so large a body of workmen, and provide for them a more equitable and adequate remedy than they now have, at the same time affording a tremendous incentive to the standardizing of state legislation in this formative stage of the movement.

LINDLEY D. CLARK

WASHINGTON, D.C.